



August 2, 2006

ASVET MEMORANDUM 03-06

MEMORANDUM FOR: ALL VETS STAFF

FROM:


CHARLES S. CICCOLELLA

SUBJECT: Investigation of USERRA cases in which an arbitration agreement is present.

PURPOSE: To provide information to VETS staff on the implications of a recent Federal appellate decision in the Fifth Circuit in which a USERRA claimant's right to bring an enforcement action in Federal district court may be subordinate to a binding arbitration agreement. To provide VETS investigators guidance in handling USERRA cases where the employer asserts that the complainant is subject to a binding arbitration agreement.

REFERENCES: 38 U.S.C. § 4302(b); Decision of *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006).

BACKGROUND: Mr. Garrett, a member of the Marine Corps Reserve, brought an action against Circuit City Stores, his former employer, alleging that Circuit City engaged in a pattern and practice of discrimination based on his military status, ultimately culminating in his termination. *Garrett v. Circuit City Stores, Inc.*, 338 F.Supp. 2d 717, 719 (N.D.Tex. 2004). Circuit City argued that Mr. Garrett was subject to an arbitration agreement covering his USERRA claim. *Id.* at 720. Consistent with VETS longstanding position, the district court found that Garrett's USERRA claim was not subject to the arbitration agreement, based on Section 4302(b) of USERRA, which provides:

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

Id. at 722.

Circuit City appealed, and the Fifth Circuit reversed, holding that section 4302(b) of USERRA did not preclude enforcement of a valid individually executed agreement to submit USERRA disputes to binding arbitration. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006). The court construed section 4302(b) as demonstrating legislative intent that Congress did not intend to exclude all arbitration under USERRA, and that arbitration does not reduce or limit *substantive* USERRA rights such as pay, benefits, promotions, awards, insurance coverage, and the like. *Id.* at 677-78. The court held that the right to file a USERRA case in Federal district court "is not a right protected by ...

USERRA." *Id.* at 678. The court considered USERRA's legislative history on section 4302(b) to be unpersuasive. *Id.* at 679-80.

Arbitration of employment disputes is not uncommon, as employers seek to incorporate binding arbitration agreements into employment contracts, or otherwise make such agreements a condition of employment. Therefore, it is likely that the issue of the enforceability of binding arbitration agreements will arise in future USERRA investigations. It is possible that an employer might cite such an agreement as precluding VETS from conducting a USERRA investigation, or as precluding the filing of an action in Federal district court.

GUIDANCE: The *Garrett* decision does not preclude VETS from carrying out any of its statutory responsibilities under USERRA. In particular, VETS will continue to receive complaints, conduct investigations, and attempt to resolve USERRA claims, including in circumstances where it appears that the claimant has entered into an agreement to arbitrate employment disputes. Similarly, if VETS' efforts to resolve such cases are unsuccessful, the claimant will be advised of his/her entitlement to request a referral to the Department of Justice under § 4323(a) of USERRA.

If it appears that a USERRA claimant has entered into an arbitration agreement with an employer, or if an employer attempts to claim that VETS' involvement in a case is precluded by an arbitration agreement, VETS staff should receive and process the complaint using normal guidelines. VETS staff should immediately obtain a copy of the arbitration agreement, and advise the regional Senior Investigator and the USERRA Program Lead of that development.

The regional Senior Investigator will assume investigative responsibility for any such cases, and will consult with the RSOL to obtain assistance regarding the potential application of the agreement to the investigation.

If the employer declines to cooperate in the investigation based on the asserted application of the arbitration agreement, the RSOL should be immediately contacted to provide assistance for the preparation of an administrative subpoena. At the same time, investigators should keep the VETS National Office Investigation and Compliance Division apprised of that situation through normal channels.

VETS investigators and staff must not provide advice to claimants or prospective claimants with respect to whether or not they should pursue arbitration. Those individuals should be advised that such advice may be obtained from private counsel.

ACTION: Senior Investigators, DVETs, and RAVETs must ensure that all investigative staff is made aware of the background information and guidance contained in this Memorandum.

EFFECTIVE DATE: Immediately.

INQUIRIES: Direct questions on this Memorandum to Kenan Torrans, 202.693.4731.

EXPIRATION DATE: Until rescinded.